

JUDY A. WILLIAMS,) 3:16-cv-00597-HDM-WGC
)
Plaintiff,)
) ORDER
vs.)
)
PINNACLE SERVICES, INC. dba)
SUMMIT COLLECTIONS SERVICES,)
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Defendant.)
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)

Plaintiff filed her complaint in this action on October 17, 2016, alleging three causes of action under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.* Plaintiff's complaint sought actual and statutory damages as to each claim for relief.

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1 offer of judgment, and on November 18, 2016, she filed notice of
2 acceptance of the offer of judgment with the court.¹ The clerk of
3 court thereafter entered judgment against defendant pursuant to the
4 terms of the offer.

5 On December 1, 2016, the plaintiff filed a motion for
6 attorney's fees and costs, which seeks an award of fees in the
7 amount of \$5,337.00 and an award of costs in the amount of \$437.00.

8 Plaintiff filed her motion pursuant to Federal Rule of Civil
9 Procedure 54. Federal Rule of Civil Procedure 54(d)(1) allows an
10 award of costs to the prevailing party. Federal Rule of Civil
11 Procedure 54(d)(2) sets forth the procedure for obtaining an award
12 of attorney's fees but does not provide the substantive basis for
13 such an award. Fees are recoverable only if there is a rule,
14 statute, or contract that authorizes such an award. See *MRO*
15 *Commc'ns, Inc. v. Am. Tel & Tel. Co.*, 197 F.3d 1276, 1281 (9th Cir.
16 1999).

17 Here, plaintiff seeks an award of costs and fees pursuant to
18 15 U.S.C. § 1692k(a)(3). Section 1692k(a)(3) provides that "in the
19 case of any successful action to enforce . . . liability" under the
20 FDCPA, the defendant is liable to the plaintiff for "the costs of
21 the action, together with a reasonable attorney's fee as determined
22 by the court." Attorney's fees are thus mandatory in a successful
23 FDCPA case. *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978
24 (9th Cir. 2008).

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26 ¹ Defendant takes issue with plaintiff's choice to wait eleven days
27 from accepting the offer to filing it with the court, arguing that she did
28 so to gain more time to file her motion for attorney's fees. However, Rule
68 provides that either party may file the notice with the court. Nothing
therefore precluded defendant from filing the notice itself to start the
clock.

1 Defendant argues that plaintiff is not entitled to an award of
2 attorney's fees and costs because defendant intended for its offer
3 to include both. Although the offer does not mention fees and
4 costs, defendant argues that it was inclusive of both because it
5 offered plaintiff \$2,500.00 when the most she could have recovered
6 under the statute was \$1,000.00.

7 The law is clearly established that where a Rule 68 offer is
8 silent on costs, the court may award an additional amount to cover
9 the prevailing party's costs. *Marek v. Chesny*, 473 U.S. 1, 6
10 (1985). Accordingly, the argument that the offer implicitly
11 included costs is unpersuasive.

12 With respect to fees, defendant relies on a Sixth Circuit
13 decision, *McCain v. Detroit II Auto Fin. Ctr.*, 378 F.3d 561 (6th
14 Cir. 2004), which found that an offer that did not mention
15 attorney's fees was nevertheless inclusive of them. However, in
16 *McCain*, the complaint sought attorney's fees with respect to every
17 claim, and the offer was made to settle "all claims and causes of
18 action." The Sixth Circuit thus concluded that the offer
19 unambiguously included attorney's fees, which were part of the
20 claims and causes of action pled in the complaint. Here, the
21 plaintiff did not seek attorney's fees in the complaint, nor did
22 the offer state that it covered all claims. *McCain* is thus
23 distinguishable from this case. However, in *Nusom v. Comh*
24 *Woodburn, Inc.*, 122 F.3d 830, 833 (9th Cir. 1997), the Ninth
25 Circuit held that a Rule 68 offer that was silent as to attorney's
26 fees did not preclude the plaintiff from seeking attorney's fees
27 pursuant to the relevant statute. The court made clear that "any
28 waiver or limitation" of attorney's fees in a Rule 68 offer "must

1 be clear and unambiguous" and that any ambiguities in the offer
2 "are construed against the offeror." *Id.*; see also *Webb v. James*,
3 147 F.3d 617, 623 (7th Cir. 1998). It concluded that the offer,
4 which was silent as to attorney's fees, did not clearly waive or
5 limit attorney's fees. *Nusom*, 122 F.3d at 833-34.

6 Here, the offer was silent as to attorney's fees and thus did
7 not unambiguously waive or limit fees. Additionally, while
8 plaintiff did assert claims for statutory damages, which are capped
9 at \$1,000.00, she also asserted claims for actual damages. The
10 defendant has not established that plaintiff could not have
11 recovered actual damages. The court concludes the offer did not
12 include attorney's fees and plaintiff is therefore entitled to an
13 award of fees pursuant to 15 U.S.C. § 1692k(a)(3).

14 In making an award of attorney's fees, the court begins by
15 calculating the "lodestar." *Caudle v. Bristow Optical Co., Inc.*,
16 224 F.3d 1014, 1028 (9th Cir. 2000). The lodestar is reached by
17 multiplying the number of hours the prevailing party reasonably
18 expended on the litigation by a reasonable hourly rate. *Id.* In
19 determining the hours to be included in the lodestar, the court
20 should exclude hours that are "excessive, redundant, or otherwise
21 unnecessary." *McCown v. City of Fontana*, 565 F.3d 1097, 1102 (9th
22 Cir. 2009).

23 In most cases, the lodestar is presumptively a reasonable fee
24 award. *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1149 n.4
25 (9th Cir. 2001). However, if the circumstances warrant, the court
26 may "adjust the lodestar to account for other factors that are not
27 subsumed within it." *Id.* Those factors are:

28 (1) the time and labor required; (2) the novelty and

1 difficulty of the questions involved; (3) the skill
2 requisite to perform the legal service properly; (4) the
3 preclusion of other employment by the attorney due to
4 acceptance of the case; (5) the customary fee; (6)
5 whether the fee is fixed or contingent; (7) time
6 limitations imposed by the client or the circumstances;
7 (8) the amount involved and the results obtained; (9)
8 the experience, reputation, and ability of the
9 attorneys; (10) the "undesirability" of the case; (11)
10 the nature and length of the professional relationship
11 with the client; and (12) awards in similar cases.

12 *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1158 (9th Cir. 2002)
13 (citing *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th
14 Cir. 1975)). The court need not consider all factors - "only those
15 called into question by the case at hand and necessary to support
16 the reasonableness of the fee award." *Id.*

17 Plaintiff's counsel seeks an hourly rate of \$350 per hour.²
18 Defendant argues that \$350 is not a reasonable hourly rate because
19 the complaint is riddled with inaccurate citations and
20 misrepresentations of the law and the facts. The court concludes
21 that \$350 an hour is a reasonable and customary hourly rate for the
22 type of work performed in this case by counsel.

23 Counsel seeks compensation for 14 hours of work.³ This
24 includes 5.5 hours spent researching and drafting the motion for
25 attorney's fees and reply, which is compensable as part of the
26 award. See *Camacho*, 523 F.3d at 981. Defendant argues that some

27 ² Plaintiff's motion indicates that counsel is seeking a "blended rate"
28 of \$330 for nine hours of work completed before the filing of the motion for
attorney's fees. This is based on a charge of \$2,975 for nine hours of work
performed. However, an examination of the billing invoice shows that there
was actually no charge for half an hour of the nine hours sought, meaning
that the hours actually charged to the plaintiff were 8.5. At a rate of
\$350 an hour, the total charge sought for 8.5 hours of work is \$2,975.
Under either analysis, the result is the same.

³ See *supra* n.2.

1 of counsel's hours were not reasonable.

2 First, defendant argues that plaintiff's counsel at one time
3 worked for defendant's manager and owner, Brian Chew, and that the
4 letters sent by defendant to plaintiff which are the subject of the
5 complaint were drafted and used by counsel during that time.
6 Defendant therefore argues that counsel's spending 3.75 hours that
7 included reviewing collections letters that he drafted was
8 unreasonable. In addition, defendant argues, this time included
9 basic FDCPA research that anyone experienced in FDCPA practice
10 should already know.

11 The court finds that 3.75 hours, which included review of the
12 letters along with a substantial amount of other work related to
13 the case, was reasonable. The fact that counsel may have drafted
14 the relevant letters did not mean he should not review them and
15 apply them to this case.

16 Second, defendant argues that counsel improperly charged for
17 work that related to plaintiff's bankruptcy. Counsel submitted
18 charges for one hour spent preparing documents that would allow
19 plaintiff to file the instant action despite her pending
20 bankruptcy, and some additional time (included in a 1.5 hour block)
21 explaining to plaintiff the repercussions of accepting the
22 defendant's offer of judgment on her bankruptcy. The court
23 concludes this time was reasonable and necessarily incurred in
24 connection with this case.

25 Finally, defendant argues that counsel spent time reviewing
26 emotional distress issues but that plaintiff did not assert a claim
27 for emotional distress in her complaint. However, plaintiff's
28 complaint sought actual damages, which can include damages for

1 emotional distress. See *McCollough v. Johnson, Rodenburg &*
2 *Lauinger, LLC*, 637 F.3d 939, 957 (9th Cir. 2011). The court
3 concludes that it was reasonable for counsel to spend time
4 discussing potential emotional distress damages with plaintiff
5 before she accepted the offer of judgment.

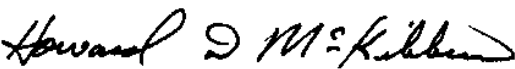
6 The court finds that all hours and the hourly rate submitted
7 by counsel for compensation are reasonable. Therefore, the
8 lodestar in this case is \$4,900.00, representing 14 hours of work
9 at \$350.00 per hour.

10 The court finds that other arguments by the defendant are
11 without merit.

12 In accordance with the foregoing and pursuant to 15 U.S.C. §
13 1692k(a)(3), the plaintiff's motion for attorney's fees and costs
14 (ECF No. 9) is hereby **GRANTED**. Plaintiff is awarded attorney's
15 fees in the amount of \$4,900.00. As to costs, plaintiff is
16 directed to file a bill of costs pursuant to Local Rule of Civil
17 Practice 54-1 on or before February 10, 2017.

18 IT IS SO ORDERED.

19 DATED: This 3rd day of February, 2017.

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21 UNITED STATES DISTRICT JUDGE
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